82-1893

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NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1983

GREGORY R. CLARK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, DOUGLAS H. CLARK, JR., and KEVIN KINERK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, BURTON KINERK, individually and on behalf of all males similarly situated in the State of Arizona,

Petitioners,

v.

THE ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, and TONY KOMADINA, Executive Director, individually and in his corporate capacity,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

==========

Douglas H. Clark, Jr.
Jonathan Rothschild
MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701
Telephone: (602) 624-8886

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether qualified male high school students may be constitutionally denied the benefits of athletic participation by being denied the right to participate in interscholastic volleyball solely on the basis of gender when females have historically been the exclusive participants in that interscholastic program?

2. Whether qualified male high school students may be constitutionally denied the benefits of athletic participation solely on the basis of gender when there is no finding of past discrimination against female athletes in interscholastic athletic activities, or that past discrimination against female athletes has not been sufficiently eradicated and compensated for, or that under the present scheme to eliminate males from a specific interscholastic athletic program would

further the goals of equal opportunity in interscholastic sports for all students?

3. Whether the State may promulgate a policy of across-the-board gender-based exclusion of males from interscholastic volleyball when less drastic alternatives are readily available to achieve the desired governmental objectives?

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution,

Amendment XIV, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

GREGORY R. CLARK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, DOUGLAS H. CLARK, JR., and KEVIN KINERK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, BURTON KINERK, individually and on behalf of all males similarly situated in the State of Arizona,

Petitioners,

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THE ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, and TONY KOMADINA, Executive Director, individually and in his corporate capacity,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The opinion rendered by the District Court for the District of Arizona is an unpublished opinion and appears in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 2, 1982. A timely petition for rehearing was denied on January 20, 1983, and an amended opinion entered on that date. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1254(1).

STATEMENT OF THE CASE

The plaintiffs are male high school students in Tucson, Arizona. The defendant, ARIZONA INTERSCHOLASTIC ASSOCIATION (AIA), is a non-profit corporation organized to have authority over its member Arizona high schools as to all matters pertaining to interscholactic athletic activities. Its members include all public and most parochial high schools in the State of Arizona. The defendant, TONY KOMADINA, is the Executive Director of the AIA.

Prior to the opening of the 1981 Arizona high school volleyball season, plaintiffs attempted to try out for their school's volleyball teams and were told they were ineligible for competition solely because of their sex. The plaintiffs were told by their school principals that volleyball is for females only. There are no male interscholastic volleyball teams in Arizona. No consi-

deration was given to plaintiffs' physical stature or individual characteristics. In all respects plaintiffs were qualified to participate in interscholastic volleyball. The Executive Board of the AIA had determined in October of 1975 that there would be no discrimination by sex in non-contact sports. Volleyball is designated a non-contact sport. This determination was modified by a resolution on October 19, 1981, after plaintiffs had requested to play volleyball on their school's interscholastic team, when the AIA resolved it would discriminate in favor of females to compensate for the females' lack of opportunity in interscholastic athletics. Currently, in Arizona, females have separate teams or may participate on the male teams in the following sports:

> Archery, badminton, gymnastics, softball, volleyball, basketball, cross-country,

golf, soccer, swimming, tennis, track and baseball.

As the result of being denied the opportunity to participate in interscholastic volleyball, plaintiffs filed a complaint in the District Court, for the District of Arizona, alleging that the Arizona Interscholastic Association's policy was in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction was proper in the District Court pursuant to 28 U.S.C., §1343 and 42 U.S.C., §1983. Jurisdiction in the Court of Appeals was pursuant to 28 U.S.C., §1291.

The plaintiffs brought on for hearing a motion for preliminary injunction which was denied by the District Court on the basis that plaintiffs would suffer no irreparable injury. Subsequently the parties submitted to the Court a set of stipulated facts (included in the Appendix hereto) and submit-

ted the cause for determination based on the evidence presented at the motion for preliminary injunction and the stipulated facts. The District Court dismissed plaintiffs' complaint and found for the defendants on the basis that not allowing males to play on the interscholastic volleyball team restricted to females was permissible discrimination in order to redress past discrimination vis-a-vis female interscholastic athletes. Plaintiffs appealed to the Court of Appeals for the Ninth Circuit which affirmed the District Court's decision based upon similar reasoning.

It should be noted that there is nothing in the record to support the proposition that past discrimination against female interscholastic athletes has not been remedied or how denying males the opportunity to compete on some basis on a school's volleyball team will operate to deny females an opportunity to engage in interscholastic athletics. In fact,

the record reflects there are currently more sports available to females, and females can compete in all sports with men if a female team is not available (with the exception of football and wrestling and that rule may be open to question), but males cannot compete with females if no male team is existing, despite the fact that there are less male athletic teams.

REASONS FOR GRANTING WRIT

ARGUMENT ONE

THE NINTH CIRCUIT HAS DECIDED THE FEDERAL QUESTION IN THIS CASE IN A WAY THAT IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Recently this Court struck down a gender-based state enforced policy when the policy's supposed compensatory objective was without factual justification. Mississippi University for Women v. Hogan, _____ U.S. _____, 102 S.Ct. 3331, ____ L.Ed.2d _____ (1982). Gender-based regulations must be examined by the standard established in Craig v. Boren, 429 U.S. 190, at 197; 97 S.Ct. 451; 50 L.Ed. 2d 397 (1976), that is, that a classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Further, gender cannot be used as a proxy for other more germane basis of classification. This Court has disapproved of classifications that

reflect archaic and overbroad generalizations based on sex. Schlesinger v. Ballard, 419 U.S. 498, at 508; 95 S.Ct. 572, at 577; 42 L.Ed.2d 610 (1975) or "old notions" of differences between the sexes. Stanton v. Stanton, 421 U.S. 7, at 14; 95 S.Ct. 1373, at 1377; 43 L.Ed.2d 688 (1975). All of the cases of this Court, cited above, were misapplied by the Ninth Circuit in the case at bar and have created authority in that Circuit conflicting in principle with the impressive line of authority noted above. In our case, the Arizona Interscholastic Association has claimed that males cannot participate on the only volleyball teams provided at the interscholastic level because this policy is helping redress past forms of discrimination against women in interscholastic athletics.

The mere recitation of a benign or ameliorative purpose for a policy will not auto-

matically validate a sex-based classification. Weinberger v. Wiesenfeld, 420 U.S. 636; 95 S.Ct. 1225; 43 L.Ed. 514 (1975). The Ninth Circuit simply accepted the policy promoted by the AIA at face value and did not examine the existing facts. Had they, they would have found there were no facts showing that any effects of the alleged past discrimination against female athletes in Arizona interscholastic programs existed, or that the present scheme of banning all males from volleyball is furthering the goal of equal athletic opportunity for females. A review of the stipulated facts will show that the Court cannot simply cite the law in this case and ignore the facts, without deciding this case in conflict with the applicable decisions of this Court. The Ninth Circuit never addressed the proposition established in Wengler v. Druggist Mutual Insurance Company, 446 U.S. 142; 100 S.Ct. 1540; 64 L.Ed.2d 107 (1980)

that the group promulgating the gender-based discriminatory policy must prove the policy is substantially related to its compensatory objective. To ignore the underlying factual predicate of finding present effects of past discrimination or having a present program alleviate effects of a past discrimination is to ignore past precedent of this Court and should not go unreviewed.

Finally, the Ninth Circuit ignored the clear dictates of this Court that in pursuing a legitimate interest, a state may not choose means that unnecessarily restrict a constitutionally protected liberty. In equal protection cases, this Court requires that states adopt the least drastic means to achieve their ends. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1975); 99 S.Ct. 983; 59 L.Ed.2d 230 (1979). The lower courts have not followed this principle and have chosen to allow the

state to utilize the most drastic remedy, complete exclusion of a gender, to achieve equal athletic opportunity, when other less drastic remedies exist. Those remedies would include limited playing time for males or expanding teams to allow for a limited number of male players.

Because the "affirmative action program" imposed by the state in this case is over-broad, results in unnecessary discrimination against males, has not been established as remedying a current pattern of discrimination or acting to remedy present effects of a past discrimination, the policy should be overturned by this Court as a violation of the Fifth and Fourteenth Amendments to the United States Constitution, and as conflicting with the above-stated principles as established by this Court.

ARGUMENT TWO

THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS AND OF STATE COURTS OF LAST RESORT.

Numerous federal court decisions stand for the specific proposition that students may not be denied access to a full range of school athletic programs solely on the basis of sex. Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973); Gomes v. Rhode Island Interscholastic League, 469 F.Supp. 659 (D.R.I. 1979), declared moot at 604 F.2d 733 (1st Cir. 1979); Yellow Springs Board of Education v. Ohio School Athletic Association, 443 F.Supp. 753 (S.D. Ohio 1978); Hoover v. Meiklejohn, 430 F.Supp. 164 (D.Colo. 1977); Gilpin v. Kansas State High School Activities Association, Inc., 377 F.Supp. 1233 (D.Kan. 1973).

Of particular importance to this Court is Gomes v. Rhode Island Interscholastic League, supra, where a federal court ruling

on identical facts reached a result in direct contradiction to the result reached by the Ninth Circuit. In Gomes, the interscholastic athletic association refused to allow a male to play on a female volleyball team. The Court held that the male must be allowed to compete with the females. The Gomes Court correctly reasoned that to deny one sex any opportunity to participate in an activity from which either sex could benefit would be an unprecedented doctrine. There may be separate but equal systems but not an exclusive opportunity for only one sex to participate. An affirmative action program cannot absolutely bar the one sex from participation. The theoretical opportunity to play other sports has never been a justification for sexual discrimination which bars the door to a particular sport. Brenden v. Independent School District 742, supra.

Numerous other federal cases hold that

females cannot be denied participation with males, at least in non-contact sports, where there is no female team in a particular sport, but there is a male team. The analysis of those cases is equally applicable in our case where males wish to participate with the females. While it may be true that generally boys are larger and stronger than girls, due process bars classification based upon such permanent presumptions where individual determinations will rebut them. Yellow Springs and Hoover, supra. In volleyball, it should be noted, males may have a size advantage in hitting and blocking but have no advantage in other skills. If anything, because volleyball has been historically limited to girls' interscholastic competition, the females will have an advantage based on experience in competition. At the interscholastic level, males will have no advantage in the other important aspects of

this form of athletic competition, including but not limited to coordination, concentration, timing, speed, strategic acumen, and technique or form. Brenden v. Independent School District 742, supra.

As the Ninth Circuit noted, a review of the case law leads to the conclusion that the denial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the Equal Protection Clause. In Clark v. AIA, et al., males have been excluded from a specific sport solely on the basis of their sex. There is no factual showing that past discrimination has not been remedied or that an across-the-board gender-based exclusion of males is substantially related to remedying past discrimination. The above cited federal case law also suggests that when a gender is excluded from a sport, there is a violation of the Equal Protection Clause, if the exclusion does not substan-

tially relate to the intended governmental purpose. The Ninth Circuit, by not allowing males to participate with females in volleyball (as they do on the professional, collegiate and interscholastic intramural levels), is furthering gender-based stereotypes as to the weaknesses of women and hindering women from furthering their skills by competing with males with similar athletic abilities.

Beyond conflicting with a long line of lower federal court decisions, the decision of the Ninth Circuit ignores an important state court decision. In Attorney General v. Massachusetts Interscholastic Athletic Association, Inc., 393 N.E.2d 284 (1979), the Supreme Court of Massachusetts held that total exclusion of boys from teams designated for girls violated the dictates of the Equal Protection Clause. Massachusetts had a state equal rights amendment which the Court used

to bolster its position, but the Court also relied on three independent rationales directly applicable to the case at bar:

A. "Physical differences between the sexes are not so clear or uniform as to justify a ruling in which sex was used for a substitute for functional classification such as height or weight." 393 N.E.2d at 290.

B. "Sex classification in this context labels women inherently weak." 393 N.E.2d at 294.

C. "There are viable alternatives to gender based classifications." 393 N.E.2d at 295.

The above rationales must be followed in ruling on a case involving gender-based discrimination in athletic competition. The lower courts in the case at bar have not applied these rationales. In Attorney General v. Massachusetts Interscholastic Athletic Association, supra, the Massachusetts Supreme Court noted the importance these rationales hold in a policy challenged on the basis of gender discrimination. It is these ration-

ales which refute the argument that to allow a mixed sports program will eliminate opportunities for female athletes. The Massachusetts Court noted that possible limitations to the women's athletic programs could be overcome by creating a system short of a sweeping gender-based prohibition. The Massachusetts Court reached this conclusion because they had accounted for the realities of athletic competition as outlined in the above policies. That Court found that the drastic affirmative action program called for by the exclusion of an entire gender from a noncontact sport was totally uncalled for given the state of the existing athletic programs. Petitioners call for review of the lower court opinions in the case at bar based on the rationale of Attorney General v. Massachusetts Interscholastic Athletic Association, supra.

ARGUMENT THREE

THE SPECIFIC FEDERAL QUESTION DECIDED BY THE NINTH CIRCUIT IN THIS CASE IS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SPECIFICALLY DECIDED BY THIS COURT.

The question of whether males may be completely exluded from competing with females in an interscholastic athletic activity, where no male program is offered, on the pretext of remedying historical inequalities in overall interscholastic athletic opportunities, presents to this Court a question founded in the Court's concern for the precarious balance between the need for affirmative action programs and the need to assure that these affirmative action programs do not violate the equal protection rights of those exluded, or create greater discrimination than the discrimination the programs were intended to alleviate. Regents of the University of California vs. Bakke, 438 U.S. 265; 98 S.Ct. 2733; 57 L.Ed.2d 750 (1978).

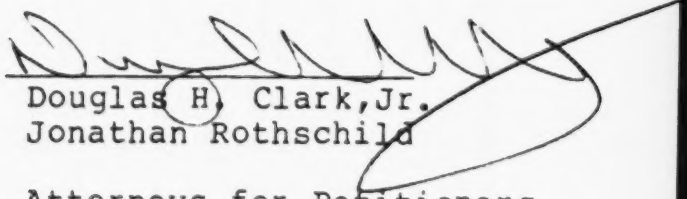
The question of how long eligible males can be systematically excluded from specific athletic programs solely on the basis of their sex in order to remedy past discrimination against female athletes is a question which should be answered by this Court. Interscholastic athletic competition is a tie which binds many Americans over the course of a lifetime. Great numbers of men and women participate each year in these activities. To exclude an entire sex from participating in this sport based on an affirmative action policy which has no current functional use is to promote unjust and damaging discrimination. For the plaintiffs, GREGORY CLARK and KEVIN KINERK, freshmen at the time this action was originated, yet another year of interscholastic volleyball will begin in the fall and still they must ask when the affirmative action program which excludes them from interscholastic athletic activity will cease.

Petitioners respectfully request that this Court grant certiorari in this case so that CLARK, KINERK and thousands of males across the country may have a definitive answer to when they will be allowed to participate in this interscholastic athletic activity. This case raises important federal questions in the areas of equal protection and affirmative action in an area this Court has not yet addressed: interscholastic athletic participation. This case presents facts which can answer these questions to the satisfaction of young athletes and state interscholastic athletic associations across the nation.

Petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the U. S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MESCH, CLARK & ROTHSCHILD, P.C.

By: 

Douglas H. Clark, Jr.
Jonathan Rothschild

Attorneys for Petitioners

APPENDIX A

OPINION OF THE NINTH CIRCUIT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY B. CLARK, a minor by and through his next best friend, guardian ad litem and natural guardian, Douglas H. Clark, Jr., et al.,	No. 82-5132
	D.C. No. CV 81-421
Plaintiffs-Appellants,	OPINION
vs.	Filed Dec. 2, 1982 Phillip B. Winsberry Clerk of US Court of Appeals
ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, et al.,	
Defendants-Appellees.	

Appeal from the United States District Court
for the District of Arizona
Honorable Richard M. Bilby, District Judge,
Presiding
Argued and Submitted July 6, 1982

Before: ANDERSON, FERGUSON, and NELSON,
Circuit Judges

NELSON, Circuit Judge:

Appellants seek review of the district court's judgment dismissing their claim that Appellees' policy of precluding boys from playing on girls' interscholastic volleyball teams in Arizona high schools violates the

equal protection clause. The district court held that the policy was a permissible means of attempting to insure equality of opportunity for girls in Arizona interscholastic sports and of redressing past discrimination. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Appellants, plaintiffs below, are students in Arizona High Schools, and have demonstrated their prowess in volleyball by participating on national championship teams sponsored by the Amateur Athletic Union. The plaintiffs have not, however, been able to participate on their high school volleyball teams. Their schools only sponsor interscholastic volleyball teams for girls, and a policy of the Arizona Interscholastic Association (the AIA) has been interpreted to preclude boys from playing on girls' teams, even though girls are permitted to participate on

boys' athletic teams. The AIA's policy on matters relating to gender discrimination is set forth in its resolution of October 19, 1981:

> 2. That the present rules regarding volleyball are silent as to whether or not boys(') volleyball is permitted, and that should sufficient interest on the part of the A.I.A. members be evinced so that the Legislative Council finds it desirable to prepare rules for and sanction interscholastic competition in volleyball for boys, that such action would certainly be permissible under the current Constitution and Bylaws of the A.I.A.;
>
> 3. That the nondiscrimination policy of the A.I.A. permits participation by girls on boys(') teams in non-contact sports in order to compensate for the girls(') historical lack of opportunity in interscholastic athletics, howevr, boys are not allowed to play on girls(') teams in non-contact sports since boys historically have had ample opportunity for participation and currently have available to them sufficient avenues for interscholastic participation, and since to allow boys to play on girls(') teams in non-contact sports would displace girls from those teams and further limit their opportunities for participation in interscholastic athletics.

The following stipulation was presented at trial:

> Generally, high school males are taller,

can jump higher and are stronger than high school females. There are six basic skills necessary in volleyball--serving, passing, setting, digging, hitting and blocking. Of these skills, hitting and blocking are enhanced by physical size, strength and vertical jump. Males generally have the potential to be better hitters and blockers than females and thus may dominate these two skills in volleyball.

There seems to be no question, then, that boys will on average be better volleyball players than girls.

The plaintiffs brought this action in September, 1981, seeking to enjoin the AIA from enforcing its policy which prevents boys from playing on girls' volleyball teams. After preliminary relief was denied, the parties submitted the case for judgment on stipulated facts. The district court entered final judgment denying the plaintiffs relief, and this timely appeal was taken.

The trial court found that the rules and regulations of the AIA do not violate the equal protection clause of the fourteenth

amendment. It held that the maintenance of a girls only volleyball team "is substantially related to and serves the achievement of the important governmental objective" of: 1) promoting equal athletic opportunities for females in interscholastic sports, and 2) redressing the effects of past discrimination. Specifically, the court held:

> (M)ore favorable treatment for females is permissible if such treatment redresses society's longstanding disparate treatment of women. (Citation omitted). Precluding male students from becoming members of the girls' volleyball team is a permissible means of redressing the past discrimination against females in high school interscholastic athletic programs.

DISCUSSION

The only issue presented on appeal is whether the trial court was correct in holding that the AIA's policy of prohibiting boys from playing on girls' volleyball teams did not deprive plaintiffs of equal protection under the fourteenth amendment.

Although the state action issue was not raised by the parties, we note that the AIA regulations in question meet the state action requirements of the fourteenth amendment. The stipulated facts indicate that the AIA is a voluntary association of all public and most private high schools in the state of Arizona. The member public schools play a substantial role in determining and enforcing the policies and regulations of the AIA. School administrators and coaches represent the member schools on AIA advisory committees. The legislative authority of the AIA in all matters pertaining to interscholastic activities is vested in the legislative council. The legislative council consists of delegates elected by the member schools in addition to four members from the various state school boards. The AIA rulemaking procedure integrally involves the member schools and school dis-

tricts in the decisionmaking process. The rules and regulations promulgated by the AIA bind all public high schools in Arizona, although any school can voluntarily withdraw from the AIA at any time. The ultimate enforcement of the rules is the responsibility of the AIA, the member schools and the public officials of those schools and school districts. Furthermore, both athletic and non-athletic activities sanctioned by the AIA take place on public school grounds.

Every court to consider the question has concluded that associations like the AIA are so intertwined with the state that their actions are considered state action. Yellow Springs Board of Education v. Ohio High School Athletic Association, 647 F.2d 651, 653 (6th Cir. 1981); Brenden v. Independent School District 742, 477 F.2d 1292, 1295 (8th Cir. 1973); Mitchell v. Louisiana High School Athletic Association, 430 F.2d 1155, 1157

(5th Cir. 1970); Louisiana High School Athletic Association v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968); Gilpin v. Kansas State High School Athletic Association, 377 F.Supp. 1233, 1237 (D.Kan. 1973); Bucha v. Illinois High School Association, 351 F.Supp. 69, 73 (N.D.Ill. 1972); Haas v. South Bend Community School Corporation, 259 Ind. 515, 519-21, 289 N.E.2d 495, 498 (1972). See Oklahoma High School Athletic Association v. Bray, 321 F.2d 269, 273 (10th Cir. 1963); Reed v. Nebraska School Activities Association, 341 F.Supp. 258, 260-61 (D.Neb. 1972). We agree that the activities of the AIA are so intertwined with the state that the regulations of the AIA must be considered state action. We are therefore free to reach the issue of whether the AIA's policy of prohibiting boys from playing on girls' volleyball teams deprived plaintiffs of equal protection under the fourteenth

amendment.

The equal protection clause of the fourteenth amendment is implicated only when a classification treats persons similarly situated in different ways. Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225, 229 (1971). A gender based discrimination is subject to a level of scrutiny somewhere between the level of "traditional" equal protection analysis (minimal scrutiny), Frontiero v. Richardson, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583, 589 (1973), and the highest level of scrutiny (strict scrutiny), Graham v. Richardson, 403 U.S. 365, 375-76, 91 S.Ct. 1848, 1854, 29 L.Ed.2d 534, 544 (1971). This intermediate level of scrutiny which applies to gender classifications is clearly set forth in Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397, 407 (1976):

"To withstand constitutional challenge,

previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

This standard continues to be the Supreme Court standard for testing gender based classifications. Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468-69, 101 S.Ct. 1200, 1204, 67 L.Ed.2d 437, 442 (1981). Rephrased, then, the issue in this case is whether the AIA's policy regarding boys not playing volleyball on the girls' team fails substantially to further an important governmental objective.

In applying this standard, the Supreme Court is willing to take into account actual differences between the sexes, including physical ones. In Michael M., Justice Rehnquist, writing for a plurality noted that the "Court has consistently upheld statutes where the gender classification is not invidious,

but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." 450 U.S. at 469, 101 S.Ct. at 1204, 67 L.Ed.2d at 442. In that case, the Court upheld a statutory rape statute that applied only to males, recognizing that since only women were subject to pregnancy and preventing teenage pregnancy was a legitimate purpose of the statute, the statute could apply differently to the different sexes. The Court reasoned that the legislature could punish the participant (the male) who would suffer few of the consequences of his conduct while the woman suffered virtually all the harmful consequences.

In Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974), the Court upheld a property tax exemption for widows but not widowers, recognizing the different financial opportunities available to men and women. Id. at 353. In Craig v. Boren, 429 U.S. at

204, 97 S.Ct. at 460, 50 L.Ed.2d at 411, the Court conceded that a sex classification could be upheld if sex represented "a legitimate accurate proxy" in a regulatory scheme. See also Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610, (1975) (different promotion system for male and female naval officers approved because of different opportunities for combat duty).

On the other hand, the Supreme Court has soundly disapproved of classifications that reflect "'archaic and overbroad' generalizations, Schlesinger v. Ballard, (419 U.S. 498, 508), or '"old notions,"' Stanton v. Stanton, 421 U.S. 7. 14 (1975)." Califano v. Goldfarb, 430 U.S. 199, 207, 97 S.Ct. 1021, 1027, 51 L.Ed.2d 270, 276 (1977) (plurality opinion).

The courts have had little trouble with the situation converse to the one at bar, where females are excluded from participation

in a sport. In Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973), the Eighth Circuit held that schools could not prohibit girls from playing on a boys' team. at least in non-contact sports.[1]

When schools have offered separate teams for boys and girls, courts have generally approved prohibitions of girls' participation on boys' teams. In O'Conner v. Board of Education, 645 F.2d 578 (7th Cir.), cert. denied, ___ U.S. ___, 102 S.Ct.641, 70 L.Ed. 2d 619 (1981), the court held that plaintiff could not demonstrate a reasonable likelihood of success on the merits of her claim that she be allowed to participate on a boys' basketball team when "separate but equal" teams were provided for boys and girls.

The courts' treatment of the issue here is not as well settled as in the two related situations discussed above. Some recent cases, however, although all in inferior

state courts, have upheld the exclusion of boys from girls' teams in situations such as the one at bar.[2] In Petrie v. Illinois High School Athletic Association, 75 Ill.App.3d 980, 394 N.E.2d 855 (1979), the Appellate Court of Illinois concluded that even under a strict scrutiny analysis, the exclusion was a legitimate means of providing athletic opportunities for girls. The court noted that the classification of teams based on sex was "based on the innate physical differences between the sexes, (rather than on) generalizations that are 'archaic' (Schlesinger v. Ballard (1975), 419 U.S. 498, 508, 95 S.Ct. 572, 577, 42 L.Ed.2d 610, 618), (or attitudes of) romantic paternalism (Frontiero v. Richardson (1973), 411 U.S. 677, 684, 93 S.Ct. 1764. 1769, 36 L.Ed.2d 583, 590)." 75 Ill. App.3d at 989, 394 N.E.2d at 862. The court acknowledged that the sexual classification could be avoided by classifying directly on

the basis of physical differences such as height or weight, but concluded that such classifications would be "too difficult to devise," 75 Ill.App.3d at 988, 394 N.E.2d at 862. primarily because of strength differentials between the sexes. Handicapping competitions, the court concluded, would be difficult and contrary to the interest of achieving the best competition possible. Other schemes, such as multi-tiered teams (for example, with varsity and junior varsity squads), or having a separate boys' team were rejected by the court as being too expensive to impose on the schools. Finally, the court concluded that sex was "the only feasible classification to promote the legitimate and sbstantial state interest of providing for interscholastic athletic opportunities for girls." 75 Ill.App.3d at 989, 394 N.E.2d at 862.

Another case reaching the same result is Mularadelis v. Haldane Central School

Board, 74 A.D.2d 248, 255-57, 427 N.Y.S.2d 458, 463-64 (N.Y.App.Div. 1980). In that case, the Appellate Division of the Supreme Court of New York held that if overall athletic opportunities for males were equal, the equal protection clause was not violated by exclusion of boys from any particular team.

While Mularadelis, 74 A.D.2d at 255-57, 427 N.Y.S.2d at 463-64, says that only overall athletic opportunities must be equal, most cases such as Mass. Interscholastic Athletic Ass'n, 378 Mass. 342, 393 N.E.2d 284, conclude that the denial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the equal protection clause. We believe that while a lack of overall equality of athletic opportunity certainly raises its own problems, the presence of such equality cannot by itself justify specific inequality of opportunity in any given sport. The ques-

tion, then, is whether denying boys the particular opportunity to compete on a girls' volleyball team, even when boys' overall opportunity is not inferior to girls', can be justified as substantially related to an important governmental interest.

As discussed above, the governmental interest claimed is redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes. There is no question that this is a legitimate and important governmental interest. Petrie, 75 Ill.App.3d at 989, 394 N.E.2d at 862.

The only question which remains, then, is whether the exclusion of boys is substantially related to this interest. The question really asks whether any real differences exist between boys and girls which justify the exclusion; i.e. are there differences which would prevent realization of

the goal if the exclusion were not allowed.

The record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished. As discussed above, there is no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense if it is an accurate proxy. See, e.g. Kahn v. Shevin, 416 U.S. at 355, 94 S.Ct. at 1737, 40 L.Ed.2d at 193; Michael M. v. Sonoma County Superior Court, 450 U.S. at 469, 101 S.Ct. at 1204, 67 L.Ed.2d at 442; Orr v. Orr, 440 U.S. 268, 280-82, 99 S.Ct. 1102, 1112-13, 59 L.Ed.2d 306, 319-21 (1979). This is not a situation where the classification rests on "'archaic and overbroad' generalizations (citation

omitted)." Califano v. Goldfarb, 430 U.S. at 207, 97 S.Ct. at 1027, 51 L.Ed.2d at 276, or "the baggage of sexual stereotypes," Orr v. Orr, 440 U.S. at 283, 99 S.Ct. at 1114, 59 L.Ed.2d at 321. Nor is this a situation involving invidious discrimination against women, Michael M., 450 U.S. at 475, 101 S.Ct. at 1207, 67 L.Ed.2d at 446, or stigmatization of women. The AIA is simply recognizing the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team. Petrie, 75 Ill.App.3d at 988-89, 394 N.E.2d at 862. The situation here is one where there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women.

We recognize that specific athletic opportunities could be equalized more fully in a number of ways. For example, partici-

pation could be limited on the basis of specific physical characteristics other than sex, a separate boys' team could be provided,[3] a junior varsity squad might be added, or boys' participation could be allowed but only in limited numbers.[4] The existence of these alternatives shows only that the exclusion of boys is not necessary to achieve the desired goal.[5] It does not mean that the required substantial relationship does not exist. Cases such as Kahn v. Shevin show that absolute necessity is not required before a gender based classification can be sustained. In Kahn, the tax credit could have been determined on the basis of actual need rather than on females' tendency on average to have a greater need. Nevertheless, the court allowed the classification.

In this case, the alternative chosen may not maximize equality, and may represent trade-offs between equality and practicality.

But since absolute necessity is not the standard, and absolute equality of opportunity in every sport is not the mandate, even the existence of wiser alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal. That is all the standard demands. Kahn v. Shevin, 416 U.S. at 356 n. 10, 94 S.Ct. at 1737-38 n.10, 40 L.Ed.2d at 193-94 n 10. While equality in specific sports is a worthwhile ideal, it should not be purchased at the expense of ultimate equality of opportunity to participate in sports. As common sense would advise against this, neither does the Constitution demand it.

AFFIRMED

FOOTNOTES

1) A number of state and federal courts have reached a similar result. See, e.g., Morris v. Michigan State Board of Education, 472 F.2d 1207 (6th Cir. 1973); Hoover v. Meiklejohn, 430 F.Supp. 164 (D.Col. 1977) (disapproving rule that prohibited girls from playing on boys' soccer team -- a contact sport team); Reed v. Nebraska School Activities Association, 341 F.Supp. 258 (D.Neb. 1972); Haas v. South Bend Community School Corporation, 259 Ind. 515, 289 N.E.2d 495 (1972).

2) See Hoover v. Meiklejohn, 430 F.Supp. at 170 (The court noted:

> Given the lack of athletic opportunity for females in past years, the encouragement of female involvement in sports is a legitimate objective and separation of teams (by sex) may promote that purpose. (Citations omitted). It may also justify the sanction of some sports only for females, of which volleyball may be an example).

But see Gomes v. Rhode Island Interscholastic League, 469 F.Supp. 659 (D.R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979) exclusion of boys from girls' volleyball team prohibited when no boys' team offered); Attorney General v. Massachussetts Interscholastic Athletic Association, 378 Mass. 342, 393 N.E.2d 284 (1979) (exclusion of boys from girls' teams prohibited under strict scrutiny mandated by state's equal rights amendment; in dictum court added that exclusion could not withstand even minimal scrutiny, 378 Mass. at 356, 393 N.E.2d at 292).

3) This would be constitutionally permissible. Gomes, 469 F.Supp. at 664; See Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), aff'd mem., 430 U.S. 703, 97 S.Ct. 1671, 51 L.Ed. 2d 758 (1977) (separate boys' and girls' schools permissible).

4) All of these alternatives were rejected by the Petrie court as either too impractical or otherwise unnecessary to the constitutionality of the exclusion alternative. See, note 6, infra. But see, Mass. Interscholastic Athletic Ass'n, 393 N.E.2d at 295.

5) The Petrie court, however, did conclude that the problems with the various other alternatives were enough to create a "substantial element of necessity" for the exclusion of boys. 75 Ill.App.3d at 990. 394 N.E.2d at 863. See, note 5, supra.

APPENDIX B

ORDER AMENDING OPINION OF THE NINTH CIRCUIT COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY B. CLARK, a minor by and through his next best friend, guardian ad litem and natural guardian, Douglas H. Clark, Jr., et al.,	No. 82-5132
	D.C. No. CV 81-421
Plaintiffs-Appellants,	ORDER AMENDING OPINION
v.	
ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, et al.,	Filed Jan. 20, 1983 Phillip B. Winsberry Clerk of US Court of Appeals
Defendants-Appellees.	

Appeal from the United States District Court
for the District of Arizona
Hon. Richard M. Bilby, District Judge,
Presiding
Argued and Submitted July 6, 1982

Before: ANDERSON, FERGUSON, and NELSON,
Circuit Judges

The Opinion filed December 2, 1982, is amended as follows:

On page 5546, column 2, lines 7, 13 and 15, "A.I.A." should read: "AIA."

On page 5547, column 1, line 1, omit "There" and insert the following: "A second

stipulation indicates that these physiologically-derived differences in athletic potential have real impact on the game of volleyball. Under the rules of the AIA, girls' volleyball teams use a net that is substantially lower than that used by boys' teams. According to the stipulated facts, then, there . . . ."

On page 5547, column 1, line 1, delete "then" and the two commas that precede and follow it.

On page 5547, column 1, line 2, insert "potentially" between "be" and "better."

On page 5548, column 2, line 3, delete entire citation to "Michael M." and insert citation "Mississippi University for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331, ___ L.Ed. ___ (1982)."

On page 5548, column 2, paragraph 2, line 4, expand citation to "Michael M." so that it reads: "Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468-69, 101

S.Ct. 1200, 1204, 67 L.Ed. 2d 437, 442 (1981)."

On page 5549, column 1, first full paragraph, line 10, at end of the paragraph, insert: "Most recently, in Mississippi University for Women v. Hogan, ___ U.S. ___, 102 S.Ct. 333. ___ L.Ed. ___ (1982), the Court struck down a gender based admissions policy when the policy's proposed compensatory objective was without factual justification.

IT IS SO ORDERED.

APPENDIX C

ORDERS OF THE DISTRICT COURT FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GREGORY R. CLARK, a minor, etc., et al., Plaintiffs, v. THE ARIZONA INTERSCHOLASTIC ASSOCIATION, et al., Defendants.	NO. CIV 81-421-TUC-RMB ORDER Filed Nov. 5, 1981

Plaintiffs are requesting that this Court grant preliminary injunctive relief enjoining defendants from enforcing any rules prohibiting male participation on high school interscholastic volleyball teams that heretofore have been composed exclusively of female participants. The parties, prior to the hearing on this matter, entered into a stipulation of facts which the Court adopts herein by this reference.

The defendant Arizona Interscholastic Association (AIA) is a nonprofit corporation authorized and doing business in Arizona.

The defendant Tony Komadina is Executive Director of the AIA. At all times during the matters out of which this litigation arose, Tony Komadina was acting for and on behalf of AIA and within the scope and course of his employment. The AIA is a voluntary association of all public and most private high schools in the State of Arizona. The AIA organizes, develops, directs, and regulates activities and competition among the member schools in athletics, music, speech, drama. chess, and ROTC. The rules and regulations promulgated by the AIA bind all public high schools and member private high schools in the State of Arizona, although any school can voluntarily withdraw from the association at any time.

Plaintiff Gregory R. Clark is a freshman student at Canyon Del Oro High School, a public high school of the Amphitheater School District, located in Pima County, Arizona. Plaintiff Kevin Kinerk is a freshman student

at Salpointe Catholic High School, a parochial school, located in Tucson, Arizona. Clark and Kinerk desired to try out for the volleyball teams at their respective high schools. On or before August 20, 1981, the plaintiffs made requests of the principles at their high schools, William Kemmeries at Canyon Del Oro and Father Frank McCarthy at Salpointe, to be allowed to compete on the volleyball teams at their respective schools. The principles told the plaintiffs that they could not try out for the available spots on the volleyball teams for the sole reason that they were males and the teams were restricted to females. The principles based these decisions on their interpretations of the AIA constitution and bylaws. The schools contacted Tony Komadina at AIA who also made an interpretation of the AIA rules that the boys may not be allowed to participate on the girls volleyball teams.

The AIA bylaws set forth the rules for

the following interscholastic sports currently played in the member schools: archery. badminton, baseball, basketball. cross country, football, golf, boys gymnastics, girls gymnastics, soccer, softball, swimming, tennis, track, volleyball and wrestling. The rules for football and basketball specifically provide that boys and girls shall not compete on the same team in that sport. Further. the Executive Board of the AIA has determined that boys and girls may not compete on the same team in contact sports. The sports offered through the AIA that are considered contact sports are football. basketball. wrestling, and soccer.

The AIA, through its rules and interpretations of said rules by its Executive Director Komadina, interpret the following contact sports to be for boys only and would not allow a girl to go out for a boys team in these sports at a school where the sport was offered: football, basketball, wrest-

ling, and soccer.

The AIA, through Komadina, considers the following sports to be for girls only and would not allow a boy to participate in these sports at a school where the sport was offered: archery, badminton, girls gymnastics, softball, and volleyball.

Separate boys and girls teams are offered in the following sports: basketball, cross country, golf, gymnastics, soccer, swimming, tennis, and track. Not all schools offer all of these sports. In schools where sports are offered with separate teams for boys and girls in the same sport, the AIA, through Komadina, would not allow boys to play on a girls team or girls to play on a boys team.

The AIA, through Komadina, would allow girls to participate in noncontact sports offered at a high school wherein there was a boys team in that sport and no girls team offered in that sport; these sports include

baseball. cross country, golf, track, tennis, and swimming. The AIA, through Komadina, would not allow boys to participate in non-contact sports offered at a high school wherein there was a girls team in that sport and no boys team offered in that sport; these sports include archery, badminton, basketball, cross country, golf, softball, swimming, tennis, track, and volleyball.

At the present time twice as many boys participate in interscholastic athletics as do girls.

Interscholastic volleyball competition in high schools in the State of Arizona has been solely limited to female students and is played under girls rules. There is no interscholastic volleyball competition for males at any high school in the State of Arizona. However, the opportunities to participate in interscholastic athletics are substantially greater for boys than girls.

At Salpointe, volleyball is the only fall sport available to girls.

The 1981 AIA season for volleyball commenced September 15 and ends October 22 with divisional playoffs thereafter.

At Canyon Del Oro, females may play on teams comprised entirely of females in the following sports: soccer, cross country, volleyball, softball, swimming, track and field, tennis, gymnastics, and basketball. Males may participate in the following sports on teams comprised entirely of males: soccer, cross country, football, baseball, gymnastics, basketball, swimming, track and field, tennis, and wrestling. Both males and females may participate in golf and chess.

At Salpointe, females may participate in the following sports on teams comprised entirely of females: volleyball, softball, swimming, track and field, tennis, and gymnastics. Males may participate in the following sports on teams comprised entirely of

males: track and field, baseball, tennis, swimming, football, cross country, and basketball. Both males and females may participate in golf. Salpointe had no girls gymnastics team during the 1980-81 school year due to lack of interest and the future of the sport at Salpointe is uncertain. Salpointe is attempting to establish a girls basketball team and would do so if sufficient funds and interest existed.

It is unknown whether there is sufficient interest among males at either Canyon Del Oro or Salpointe to have enough players for an all male volleyball team. The AIA is aware of no interest in high school boys volleyball expressed by any students in any high school other than Canyon Del Oro and Salpointe.

Volleyball is available for boys participation in many high schools in the State of Arizona in physical education classes and intramural activities.

The plaintiffs Clark and Kinerk are highly skilled in volleyball. They are members of the Tucson Athletic Club Boys 13 and Under Volleyball Team which is the current AAU Junior Olympic Champion and the United States Volleyball Association Junior National Champion. Allowing boys, such as plaintiffs, to play on the girls team would seriously hamper the efforts to develop good female volleyball players.

At the time of the hearing, the season was about to commence and it was too late to integrate any new players into the teams. Furthermore, final cuts had been made and any additional players would have necessitated cutting girls who had already been told they had made the team.

The traditional equitable criteria for granting preliminary injunctive relief are the following:

1. a strong likelihood of success on the merits,

2. the possibility of irreparable injury to plaintiff if the preliminary relief is not granted,

3. a balance of hardships favoring the plaintiff,

4. advancement of the public interest (in certain cases).

Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

The Court finds that the plaintiffs will suffer no irreparable injury if the preliminary injunction is not granted. The plaintiffs are freshmen and have three more volleyball seasons in their high school careers. The plaintiffs have opportunities other than a girls high school volleyball team wherein to play volleyball. Moreover, the respective high schools of the plaintiffs offer a variety of other sports available to the plaintiffs, some which most likely develop skills similar to those developed in volley-

ball, which the plaintiffs may pursue if they desire to participate in high school inter-scholastic athletics.

The Court has not at this time addressed any of the remaining issues and will not do so until the matter is finally submitted for decision.

IT IS ORDERED that preliminary injunctive relief is DENIED.

The Clerk of the Court is directed to mail copies of this Order to all counsel of record.

DATED: November 5, 1981

/s/ Richard M. Bilby
Richard M. Bilby
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GREGORY R. CLARK, a minor, etc., et al.,	NO. CIV 81-421-TUC-RMB
Plaintiffs,	ORDER
v.	Filed Jan. 20, 1982
THE ARIZONA INTERSCHOLASTIC ASSOCIATION, et al.,	
Defendants.	

Plaintiffs brought this suit contending that the Arizona Interscholastic Association (AIA) rules and regulations which prohibit boys from playing on the girls' volleyball team, thereby prohibiting males from participating in interscholastic volleyball, violate the equal protection clause and the due process of the fourteenth amendment.

The parties submitted the case to the Court for decision based upon all the pleadings submitted to the Court and upon all exhibits and testimony presented at the hear-

ing on the Order to Show Cause.

This Court hereby incorporates into this Order the Court's Order of November 5, 1981, and the Supplemental Stipulated Facts filed on December 11, 1981.

To withstand a constitutional challenge under the fourteenth amendment, a gender-based classification must serve important governmental objectives and must be substantially related to the achievement of those objectives. E.g., Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150 (1980); Orr v. Orr, 440 U.S. 268, 279 (1979); Clifano v. Webster, 430 U.S. 313, 316-17 (1977); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977). The rules and regulations of the AIA do not violate the fourteenth amendment because maintaining a girls only volleyball team is substantially related to and serves the achievement of the important governmental objective of promoting equal athletic opportunities for females in interscho-

lastic sports. See Petrie v. Illinois High School Association, 394 N.E.2d 855, 862 (App. Ct. 1979). Moreover, more favorable treatment for females is permissible if such treatment redresses society's longstanding disparate treatment of women. Califano v. Webster, 430 U.S. at 317-18. Precluding male students from becoming members of the girls' volleyball team is a permissible means of redressing the past discrimination against females in high school interscholastic athletic programs. See Mularadelis v. Haldane Central School Board, 427 N.Y.S.2d 458, 464 (App. Div. 1980); cf. Orr v. Orr, 440 U.S. at 261; Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

Once the effects of past discrimination have been eradicated from interscholastic athletics programs, however, disparate treatment of the sexes might violate the fourteenth amendment.

IT IS ORDERED that JUDGMENT be entered

in favor of the defendants and against the plaintiffs.

The Clerk of the Court is directed to mail copies of this Order to all counsel of record.

DATED: January 20, 1982.

/s/ Richard M. Bilby
Richard M. Bilby
United States District Judge

APPENDIX D

STIPULATED FACTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GREGORY R. CLARK, a minor by and through his next best friend, guardian ad litem and natural guardian, Douglas H. Clark, Jr., and KEVIN KINERK, a minor by and through his next best friend, guardian ad litem and natural guardian, Burton Kinerk, individually and on behalf of all males similarly situated in the State of Arizona,	No. CIV-81-421-TUC-RMB
Plaintiffs,	
vs.	
THE ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, and TONY KOMADINA, Executive Director, individually and in his corporate capacity,	STIPULATED FACTS
Defendants.	

The parties herein, by and through their attorneys undersigned, stipulate to the following facts and the admission of the Exhibits listed herein for the purposes of the Court's hearing on Plaintiffs' Order to Show Cause scheduled September 12, 1981.

1. The Arizona Interscholastic Asso-

ciation (AIA) is a non-profit corporation authorized and existing under the laws of the State of Arizona and presently in good standing. That the members of the corporation include all public and most parochial high schools in the State of Arizona. The democratic governance of the AIA gives representation and input opportunities to all member schools in the State through their administrators and coaches who serve on the advisory committees. The legislative authority of the AIA in all matters pertaining to interscholastic activities is vested in the legislative counsel. The legislative counsel consists of delegates elected from each division in the conference by the member conference schools and in addition there are four members from the various State school boards.

2. Article I, Section III of the Consitution of the AIA provides that the philosophy of the AIA is that interscholastic

activities are beneficial to the total educational program and it believes there is a need for maintaining the proper balance between the academic programs of the member schools and extra school activities. To these ends the AIA seeks to supplement the overall aims and objectives of the secondary schools by organizaing, developing, directing and regulating activities and competition among member schools in athletics, music, speech, drama, chess and ROTC. Some of the objectives that are specifically set forth in Article I, Section III are as follows:

a. To approve, direct and develop all athletics, music, speech, drama, chess and ROTC activities of a competitive nature and involving more than one school, where a championship, winner or rating is to be determined.

b. To assure that interscholastic activities remain an integral part of the

knowledge, skills, attitudes and proper emotional patterns of high school youths and that such activities be supervised to promote the health and social well-being of the participants.

c. To strengthen and make uniform eligibility rules governing participation and interscholastic contests.

3. The AIA is organized in such a way that the member schools promulgate rules pursuant to a procedure which integrally involves the member schools and members of school districts in the decision-making process and the ultimate enforcement of the rules becomes the responsibility of the AIA, the member schools and the public officials of those schools and school districts. The rules and regulations promulgated by the AIA bind all public high schools in the State of Arizona, although any school can voluntarily withdraw from the AIA at any time.

4. That the athletic and non-athletic

activities sanctioned by the AIA take place on public school grounds, including all public schools, some junior colleges and the three university campuses in the State of Arizona, as well as various facilities owned and operated by private parties, municipalities and counties in the State of Arizona.

5. That most public high schools in the State of Arizona receive Federal financial assistance, but not designated or primarily used in their athletic programs.

6. Article V, Section II of the Bylaws of the AIA provides no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.

7. Article IV, Section V of the Constitution of the AIA provides that the Executive Board shall interpret the Constitution and Bylaws of the Association and impartially en-

force the same. All requests for rulings or interpretations of the Constitution and By-laws shall be made in writing by the responsible school official or his designated representative to the Executive Board.

8. Article I, Section II, paragraph C provides that the duties of the Executive Director as agent of the Executive Board shall be in part as follows: to render a ruling or state a policy, when such is requested by a responsible school official, without waiting for an Executive Board meeting. Should the responsible school official not concur in the judgment of the Executive Diretor, he may appeal the judgment to the Executive Board.

9. The Executive Board of the AIA determined in its October 1975 meeting that there be no discrimination by sexes in non-contact sports. Further, the Board determined boys and girls cannot compete on the same team in contact sports. Contact sports

identified by HEW are football, basketball, wrestling, soccer and field hockey.

10. Article IV, Section I of the AIA Bylaws provides that the Executive Board of the AIA shall have the authority to determine the eligibility of the student when the student's particular status is not clearly defined in the rules of eligibility. Article IV, Section III of the Bylaws provides that all requests for rulings or interpretations of the Constitution and the Bylaws shall be made by the school administrator or his designated representative to the Executive Director.

11. Art Mangels is the Athletic Director at Canyon Del Oro High School, Tucson, Arizona, and Ed Dougherty is the Athletic Director at Salpointe High School, Tucson, Arizona. Tony Komadina is the Executive Director of the AIA at the present time and has been for six years immediately last past.

12. That Tony Komadina was contacted by

both Ed Dougherty and Art Mangels with respect to the Plaintiffs and other boys going out for the volleyball teams at their respective high schools. Tony Komadina, acting within the scope and course of his employment and within the provisions of the Constitution and Bylaws of the AIA, made an interpretation of the rules and told both men that according to the rules the boys would not be allowed to participate in volleyball.

13. Plaintiff Gregory Clark is a freshman student at Canyon Del Oro High School and Plaintiff Kevin Kinerk is a freshman student at Salpointe High School. Canyon Del Oro High School is a public high school in Pima County, Arizona, and Salpointe is a parochial school in Tucson, Arizona. Both Plaintiffs made requests of the principals at their respective high schools, being William Kemmeries of Canyon Del Oro and Father Frank McCarthy of Salpointe, to be allowed to compete on the volleyball teams at their respective high

schools. These requests were made on or about August 20, 1981. Volleyball practice at AAA schools began August 24. Canyon Del Oro and Salpointe are AAA schools. Therefore, the requests were made to the day of commencement of volleyball practice at both high schools.

14. Neither school, through its responsible school officials or school administrators, took the steps necessary to appeal the judgment of the Executive Director to the Executive Board as provided by the Constitution of the AIA Article VI, Sections III and V. On September 30, 1981, William Kemmeries wrote a letter to Tony Komadina, a copy of which is attached hereto and stipulated into evidence as Exhibit A.

15. That in response to the letter the Executive Board, at its meeting held September 8, 1981, took the action described on Exhibit B, attached hereto.

16. The AIA is a member of the National

Federation of State High School Athletic Associations and the handbook of that Association containing its rules, regulations, bylaws and constitution is stipulated as being admitted as Exhibit C.

17. Canyon Del Oro High School is in the Amphitheater Public School District and it is the policy of Amphitheater Public Schools not to discriminate on the basis of sex, race, color, creed, age, handicap, political affiliations, marital status or national origins in its educational programs, activities or employment policies in compliance with Federal and State laws.

18. The AIA Bylaws commencing at Article IX set forth the rules for the various interscholastic sports now played in the member schools. The sports are as follows: archery, badminton, baseball, basketball, cross-country, football, golf, boys gymnastics, girls gymnastics, soccer, softball, swimming, tennis, track, volleyball and

wrestling. The rules contained in Article XIV for football and Article XII for basketball specifically provide in Section II(C) that boys and girls shall not compete on the same team in that sport. None of the other rules in any of the other sports have such specific designations.

19. The AIA, through its rules and interpretations of said rules by its Executive Director Tony Komadina, interpret the following sports to be girls only and would not allow a boy to go out for the sport at a school where the sport was offered: archery, badminton, girls gymnastics, softball and volleyball.

20. The AIA, through its rules and interpretations of said rules by its Executive Director Tony Komadina, interpret the following contact sports to be boys only and would not allow a girl to go out for the following contact sports at a school where the sport was offered: football, wrestling,

basketball and soccer.

21. Sports are offered in member schools with separate boys and girls teams in basketball, cross-country, golf, gymnastics, soccer, swimming, tennis and track. Not all schools offer all of these sports. In any school where sports are offered with separate boys and girls teams in the same sport, Tony Komadina, in interpreting the rules, Constitution and Bylaws of the AIA and in determining eligibility, would not allow boys to play on the girls teams and girls to play on the boys teams.

22. Tony Komadina would allow girls to go out for any non-contact sport which was offered at her high school wherein there was a boys team in that sport and no girls team in that sport offered. This would include baseball, cross-country, golf, track, tennis and swimming. In no case would he allow a boy to go out for a non-contact sport offered at his high school for girls only.

23. In no case would a boy be allowed to participate in the following non-contact sports if offered at his high school for girls when there were no boys team in that sport: archery, badminton, basketball, cross-country, golf, softball, swimming, tennis, track and volleyball.

24. In making his ruling and interpretation in this matter of the AIA Constitution and Bylaws, Tony Komadina was not aware of the physical stature and individual characteristics of either of the Plaintiffs herein and was not aware specifically of the sports programs offered at either high school.

25. Sports are an important and integral part of a student's educational experience.

26. Athletic competition is offered at Canyon Del Oro High School in the following categories: boys baseball, boys and girls basketball, boys and girls cross-

country, boys football, boys golf, boys and girls gymnastics, boys and girls soccer, boys and girls swimming, girls softball, boys and girls tennis, boys and girls track, girls volleyball, and boys wrestling.

27. Interscholastic athletic competition is offered at Salpointe High School in the following categories: boys baseball, boys basketball, boys and girls cross-country, boys football, co-ed golf, boys and girls gymnastics, girls softball, boys and girls tennis, boys and girls track, girls volleyball, boys and girls swimming and boys wrestling. Salpointe is attempting to establish a girls basketball team and would do so if there was interest and funds were available.

28. There is no contention by the Defendants herein that if boys were allowed to participate with the girls that there would be any unreasonable risks of injury to the females because of such participation and the member schools' and Association's interest

in safety is not going to be urged as a reason to prohibit co-ed participation in volleyball.

29. The 1981 AIA season for volleyball commences September 15 and ends October 22, with divisional playoffs after that.

30. The AIA, through its officials, directors, administrators and other employees, is aware of no interest in high school boys volleyball expressed by any students in any high school other than Salpointe and Canyon Del Oro.

31. It is agreed by the parties herein and school administrators and officials involved that if boys were allowed to participate in the existing volleyball programs, interest among the boys would be generated and in the future there may be strong participation by the boys.

32. There is no interscholastic volleyball team for boys at any high school in the State of Arizona and there are such teams

open to girls at virtually every high school in the State of Arizona. If volleyball is not the most popular sport as far as number of schools and participants among the girls, it is at least among the top three sports, along with softball and track.

33. That the AIA, through the National Federation of State High School Athletic Associations, received the following statement and answer from the Director of the Office of Civil Rights Department of Health, Education and Welfare in Washington, D.C.:

> "When a team in non-contact sports, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for which no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered."
>
> Q If the school operates a team for girls in a noncontact sport (e.g., volleyball), but not for boys, must it permit boys to try out for the team?
>
> A No, unless - and this would be

> rare - boys athletic opportunities at that school have been limited.
>
> The fact that one boy's opportunities have been limited because of lack of ability, does not mean the school must permit him to try out for the girls team. Boys and girls are to be considered collectively, and on a recipient-by-recipient basis - not statewide or regionally. And "limited opportunities" refers to overall opportunities and not sport-by-sport opportunities.

34. Volleyball is available for boys' participation in many member schools of the AIA in physical education classes and intramural activities.

35. The AIA has not established any nondiscriminatory minimum standards for evaluating class qualifications for non-contact interscholastic athletics.

36. The only written materials which were considered by Mr. Komadina in reaching his decision in this matter interpreting the rules as not allowing boys to participate in

volleyball programs at Canyon Del Oro and Salpointe are set forth in the Constitution and Bylaws of the AIA, the Executive Board policy determination of October 1975 heretofore mentioned, and the HEW statement previously mentioned.

37. The only other factors considered by Mr. Komadina which were not written in making his decision herein were (1) that boys would tend to dominate the sport of volleyball if they got interested in it, thereby reducing the number of available spots for girls; and (2) that girls' opportunity in sports in the past has generally been limited as far as the variety of sports available to them and the number of participants in the various athletic programs.

38. Generally, the principal objection voiced by Mr. Kemmeries, Father McCarthy, Teresa Haggerty and the AIA concerning the boys' participation in the volleyball program is generally boys, because of their

physical size and strength, will tend to dominate play and eventually eliminate the girls from participation in the program or reduce their participation in number, thereby taking places on the teams previously occupied by girls.

DATED this 11th day of September, 1981.

MESCH, CLARK & ROTHSCHILD, P.C.

By: /s/ Douglas H. Clark, Jr.
Douglas H. Clark, Jr.
Attorneys for Plaintiffs

DECONCINI, McDONALD, BRAMMER
YETWIN & LACY, P.C.

By: /s/ John C. Richardson
J. Wm. Brammer, Jr.
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Defendants

LAW OFFICES OF MICHAEL MIGNELLA

By: /s/ Mark R. Mignella
Mark R. Mignella
101 North First, Suite 2026
Phoenix, Arizona 85003

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GREGORY R. CLARK, a minor, etc., et al.,	NO. CIV 81-421-TUC-RMB
Plaintiffs,	
v.	STIPULATED FACTS
THE ARIZONA INTERSCHOLASTIC ASSOCIATION, et al.,	
Defendants.	

1. Plaintiff GREGORY R. CLARK is a male freshman student at Canyon del Oro High School, a public high school of the Amphitheater School District, located in Pima County, Arizona. Plaintiff KEVIN KINERK is a male freshman student at Salpointe Catholic High School, a private high school located in Tucson, Pima County, Arizona.

2. That defendant ARIZONA INTERSCHOLASTIC ASSOCIATION (hereinafter "AIA") is a non-profit corporation authorized and doing business in the State of Arizona. The Defendant, TONY KOMADINA is Executive Director of the

AIA. At all times during the matters out of which this litigation arose, TONY KOMADINA was acting for and on behalf of the Defendant AIA, and within the scope and course of his employment.

3. The AIA is a voluntary association of all public and most private high schools in the State of Arizona and sponsors a variety of interscholastic activities, including athletics. The AIA formulates and promulgates certain rules and regulations and sanctions interscholastic competition among its member schools.

4. The Plaintiffs CLARK and KINERK desire to try out for the volleyball teams with their respective high schools and are personally well qualified and skilled in volleyball by reason of being members of the Tucson Athletic Club Boys 13 and under Volleyball Team which is currently the AAU Junior Olympic Champion and the United States Volleyball Association Junior National Champion.

5. The Plaintiffs CLARK and KINERK attempted to try out for their respective high school volleyball teams, but were instructed by the principals and coaches of their respective schools that they could not try out for the available spots on the volleyball teams for the sole reason that they were males and that the team was restricted to females. These decisions were based on interpretations of the AIA constitution and bylaws by William F. Kemmeries, Principal of Canyon del Oro High School, and Father Frank McCarthy, Principal of Salpointe Catholic High School. Tony Komadina subsequently concurred in these interpretations.

6. Interscholastic volleyball competition in high schools in the State of Arizona heretofore has been solely among female students. There is no interscholastic volleyball competition among males at any high school in the State of Arizona.

7. The AIA rules and regulations cur-

rently in effect are attached hereto as Exhibit 1.

8. The Canyon del Oro High School volleyball schedule is attached hereto as Exhibit 2.

9. The Salpointe Catholic High School volleyball schedule is attached hereto as Exhibit 3.

10. At Canyon del Oro High School, females may play on teams comprised entirely of females in the following sports: soccer, cross country, volleyball, softball, swimming, track and field, tennis, gymnastics and basketball. Males may participate in the following sports on teams comprised entirely of males: soccer, cross country, football, baseball, gymnastics, basketball, swimming, track and field, tennis and wrestling. Both males and females may participate in chess and golf.

11. At Salpointe Catholic High School, females may participate in the following

sports on teams comprised entirely of females: volleyball, softball, swimming, track and field, tennis and gymnastics. For lack of interest, there was no gymnastics team during the 1980-81 school year, and it is uncertain whether there will be a gymnastics team during the 1981-82 school year. Males may participate in the following sports on teams comprised entirely of males: track and field, baseball, tennis, swimming, football, cross country and basketball. Males and females may both participate on the golf team.

12. In addition to GREGORY CLARK, there are four other males interested in trying out for the volleyball team at Canyon del Oro High School, and in addition to KEVIN KINERK, there is one other male interested in trying out for the volleyball team at Salpointe Catholic High School.

13. In private Catholic elementary schools in the Tucson Diocese, both soccer and volleyball are coeducational sports.

However, in order to ensure that males do not dominate the volleyball games, the Diocese has instituted a rule that no more than two males per team may play at any given time (out of a total of six team members).

14. Teresa Haggerty, the junior varsity volleyball coach at Salpointe Catholic High School, who has played competitive volleyball at the high school and college levels, as well as on city recreational league teams, is of the opinion that, if males are allowed to participate together with females on high school volleyball teams, within a short period of time, perhaps as long as two years, the males will dominate the game and eliminate positions that females would have otherwise occupied on the volleyball teams. She is further of the opinion that boys should be offered the opportunity of competing in volleyball, but only on all male teams, and that those teams should compete only against other all male teams.

15. William F. Kemmeries, Principal of Canyon del Oro High School, who has played competitive volleyball for many years, has instructed physical education and coached athletic teams, is of the opinion that to permit males to compete for positions on the heretofore all female high school volleyball teams would ruin an excellent team sport and competitive system which has been created by and for females, and within a very short period of time the males would dominate the sport. Mr. Kemmeries is further of the opinion that males should be offered the opportunity to compete in high school volleyball but should be restricted to all male teams competing only against other all male teams. He is also of the opinion that there are fewer interscholastic athletic opportunities available for females than males at Canyon del Oro High School, although the situation in that respect is much better presently than it has been in the past.

16. Father Frank McCarthy, Principal of Salpointe Catholic High School, is of the opinion that there are fewer interscholastic athletic opportunities for females than for males at his school, although those opportunities have increased substantially over the years.

17. Defendant Tony Komadina, the Executive Director of the Defendant AIA, who has been a superintendent of schools, a high school principal and a teacher, including the instructing of both boys and girls in volleyball, is of the opinion that if males are permitted to compete for positions on volleyball teams that heretofore have been restricted to female players, that the males will soon dominate the sport to a point that the number of females competing will be reduced from the present level of approximately 4,000 across the State of Arizona, to approximately 50. Mr. Komadina is further of the opinion that to permit males to compete

for positions on any non-contact sport team previously restricted to females would be inappropriate, given the history of limited opportunities for females in interscholastic athletics.

18. Generally, high school males are taller, can jump higher and are stronger than high school females. There are six basic skills necessary in volleyball -- serving, passing, setting, digging, hitting and blocking. Of these skills, hitting and blocking are enhanced by physical size, strength and vertical jump. Males generally have the potential to be better hitters and blockers than females and thus may dominate these two skills in volleyball.

19. In early August, 1981, Mr. Kemmeries was contacted by the mother of one of the boys interested in trying out for the volleyball team at Canyon del Oro High School. She expressed that interest to Mr. Kemmeries. Mr. Kemmeries was contacted on approximately

August 20, 1981, by the father of Gregory Clark concerning the same subject. Mr. Kemmeries advised Mr. Clark at that time that no boy would be permitted to try out for the Canyon del Oro volleyball team. At approximately the same time that Mr. Clark talked with Mr. Kemmeries, Mr. Clark had a similar conversation with Father McCarthy, Principal of Salpointe Catholic High School, and Mr. Clark was advised by Father McCarthy that no boys would be permitted to try out for the Salpointe volleyball team.

20. The rules for volleyball as played by males and females are identical with one single exception, that being the height of the net. In high school volleyball for males, the net height is eight feet, and for high school volleyball for females, the net height is seven feet four and one-quarter inches.

21. It is unknown whether there is sufficient interest among males to have enough

players for an all male volleyball team at either Salpointe Catholic High School or Canyon del Oro High School.

22. The AIA does not receive any federal financial assistance.

DATED this 11 day of September, 1981.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By /s/ J. Wm. Brammer, Jr.
J. Wm. Brammer, Jr.
John C. Richardson
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Defendants

and

Law Offices of Michael Mignella

By /s/ Mark R. Mignella
Mark R. Mignella
101 N. First,Suite 2026
Phoenix, Arizona 85003

MESCH, CLARK & ROTHSCHILD, P.C.

By /s/ Douglas H. Clark, Jr.
Douglas H. Clark, Jr.
Frederick C. Hickle
259 North Meyer Avenue
Tucson, Arizona 85701
Attorneys for Plaintiffs

COPIES of the foregoing
delivered this 11th day of
September, 1981 to:

Hon. Richard M. Bilby
United States District Court
55 East Broadway
Tucson, Arizona 85701

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GREGORY R. CLARK, a minor, etc., et al., Plaintiffs, v. THE ARIZONA INTERSCHOLASTIC ASSOCIATION, et al., Defendants.	NO. CIV 81-421-TUC-RMB SUPPLEMENTAL STIPULATED FACTS

The parties, by and through their attorneys undersigned, stipulate to the following facts for the purposes of the Court's determination in this matter.

1. Article XXIII, Section II B(d), of the Arizona Athletic Association Bylaws (1981-1982) provides:

> A roster of no more than twelve (12) players shall constitute a school team for divisional or state tournaments.

2. The Defendant, Arizona Interscholastic Association (A.I.A.), if it deemed advis-

able, could change Article XXIII, Section II B(d), and increase the number of players allowed on the school roster.

3. On October 19, 1981, at the meeting of the Executive Board of the Defendant A.I.A., the Executive Board unanimously passed the following resolution:

> The Executive Board was asked to interpret the Volleyball rules and the Non-Discrimination Policy of the Arizona Interscholastic Association in relationship to the Clark v. A.I.A. court case which is being heard in U.S. District Court in Tucson. The Executive Board determined:
>
> 1. That the current rules regarding volleyball apply to girls only, that there is no provision in the current rules for boys volleyball, and that only girls may compete on a girls volleyball

team;

2. That the present rules regarding volleyball are silent as to whether or not boys volleyball is permitted, and that should sufficient interest on the part of A.I.A. members be evidenced so that the Legislative Council finds it desirable to prepare rules for and sanction interscholastic competition in volleyball for boys, that such action would certainly be permissible under the current Constitution and Bylaws of the A.I.A.;

3. That the nondiscrimination policy of the A.I.A. permits participation by girls on boys teams in non-contact sports in order to compensate for the girls historical lack of opportunity in interscholastic athletics, however, boys are not allowed to play on girls teams

in non-contact sports since boys historically have had ample opportunity for participation and currently have available to them sufficient avenues for interscholastic participation, and since to allow boys to play on girls teams in non-contact sports would displace girls from those teams and further limit their opportunities for participation in interscholastic athletics.

4. On November 16, 1981, the Defendant A.I.A. approved the October 19, 1981, resolution as mentioned above and the minutes of the October 19, 1981, meeting containing such resolution.

5. The Plaintiffs herein, Gregory R. Clark and Kevin Kinerk, each requested the principals of their respective high schools to write to the Executive Board of the A.I.A. asking the Executive Board for a determina-

tion of the eligibility of the boys to play volleyball. Such a request is authorized by the Constitution of the A.I.A., Article VI, Sections III and V, and the Bylaws, Article I, Section II B(a).

6. Attached as Exhibit "A" to this Supplemental Stipulated Facts, and incorporated by reference, is a document which indicates the number of participants currently allowed per sport for fall sports sanctioned by the A.I.A.

7. Attached as Exhibit "B" to this Supplemental Stipulated Facts, and incorporated by reference, is a document which indicates the total number of participants by year in fall sports sanctioned by the A.I.A.

8. There is no limit on the number of males that may participate on a school's interscholastic football teams (including varsity, junior varsity and freshman levels), but such teams normally have between 30 and 50 members at each level of competition.

9. Although an unlimited number of males and females may compete on the junior varsity and freshman levels of cross-country competition, historically and at the present time there have been more male than female team members.

10. Although females may compete in male non-contact sports (e.g., baseball), very few females have historically, or at the present time, done so.

DATED this 11 day of December, 1981.

MESCH, CLARK & ROTHSCHILD, P.C.

By: /s/Douglas H. Clark, Jr.
Douglas H. Clark, Jr.
259 North Meyer Avenue
Tucson, Arizona 85701-1090
Attorneys for Plaintiffs

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By: /s/John C. Richardson
John C. Richardson
J. Wm. Brammer, Jr.
240 North Stone Avenue
Tucson, Arizona 85701

and

Mark R. Mignella
LAW OFFICES OF MICHAEL MIGNELLA
101 North First, Suite 2026
Phoenix, Arizona 85003

Attorneys for Defendants

NUMBER OF PARTICIPANTS ALLOWED PER SPORT FOR FALL SPORTS

SPORT	VARSITY	JUNIOR VARSITY	FRESHMEN
FOOTBALL	unlimited	unlimited	unlimited
VOLLEYBALL	12	12	12
BADMINTON	6	6	6
CROSS COUNTRY			
Boys	7	unlimited	unlimited
Girls	7	unlimited	unlimited
*GIRLS SWIMMING	44	0	0

*The National Federation rule book states in championship meets a school may enter 4 persons in each individual event (9 events) and 1 team in each relay event (2). There are no junior varsity or freshmen teams.

Exhibit "A"

TOTAL NUMBER OF PARTICIPANTS BY YEAR IN FALL SPORTS

GIRLS' FALL SPORTS	76-77	77-78	78-79	79-80
Badminton	640	212	224	176
Cross County	-0-	-0-	not recorded	835
Volleyball	2,376	3,522	3,948	3,947
Swimming	600	1,016	1,118	1,097
Total	3,616	4,750	5,290	6,055
BOYS' FALL SPORTS				
Football	10,215	12,269	13,109	13,175
Cross Country	2,475	1,910	2,185	1,816
Total	12,690	14,179	15,294	14,991

Exhibit "B"

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CLERK

NO. 82-1893

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

GREGORY R. CLARK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, DOUGLAS H. CLARK, JR., and KEVIN KINERK, a minor, by and through his next best friend, Guardian ad Litem and natural Guardian, BURTON KINERK, individually and on behalf of all males similarly situated in the State of Arizona,

Petitioners,

vs.

THE ARIZONA INTERSCHOLASTIC ASSOCIATION, an Arizona corporation, and TONY KOMADINA, Executive Director, individually and in his corporate capacity,

Respondents.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

==========

John C. Richardson, Esq.
DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.
240 North Stone Avenue
Tucson Arizona 85701
(602) 623-3411
Attorneys for Respondents

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YETWIN & LACY, P.C.
240 North Stone Avenue
Tucson Arizona 85701
(602) 623-3411
Attorneys for Respondents

QUESTION PRESENTED

May Respondents, consistent with the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution, exclude males from competing on female interscholastic volleyball teams in Arizona in order to provide females with increased athletic opportunities and to redress past discrimination against females in high school interscholastic athletics?

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NO. 82-1893

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

==========

Respondents, Arizona Interscholastic Association and Tony Komadina, respectfully request that this Court deny the Petition for

Writ of Certiorari seeking review of the Ninth Circuit's decision in this case.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported in 695 F.2d 1126 (9th Cir. 1983).

RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS AND OF THE CASE

On pages 3 through 7 of their Petition for Writ of Certiorari,[1] Petitioners[2] set forth in general the facts and procedural history of the case. Respondents Arizona Interscholastic Association and Tony Komadina[3]

---

[1]References in this Response to Petitioners' Petition will be designated "Pet. at ___."

[2]In their Petition to this Court, Petitioners are referenced as "Plaintiffs." They will be referenced herein as "Petitioners."

[3]Respondents Arizona Interscholastic Association and Tony Komadina will be referred to herein as "Respondents" or the "AIA". They are referenced in the Petition as "Defendants." The AIA has no parent companies or subsidiaries. The AIA is affiliated with the National Federation of State High School Associations.

deem it necessary, however, to supplement Petitioners' Statement of the Case with the following:

1. On October 19, 1981, at a meeting of the Executive Board of the AIA, the following resolution was passed:

> "The Executive Board was asked to interpret the Volleyball rules and the Non-Discrimination Policy of the Arizona Interscholastic Association in relationship to the Clark v. A.I.A. court case which is being heard in U.S. District Court in Tucson. The Executive Board determined:
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> 1. That the current rules regarding volleyball apply to girls only, that there is no provision in the current rules for boys [sic] volleyball, and that only girls may compete on a girls [sic] volleyball team;
>
> 2. That the present rules regarding volleyball are silent as to whether or not boys [sic] volleyball is permitted, and that should sufficient interest on the part of A.I.A. members be evidenced so that the Legislative Council finds it desirable to prepare rules for and sanction interscholastic competition in volleyball for boys, that such action would certainly be permissible under the current Constitution and Bylaws of the A.I.A.;

> 3. That the nondiscrimination policy of the A.I.A. permits participation by girls on boys [sic] teams in non-contact sports in order to compensate for the girls [sic] historical lack of opportunity in interscholastic athletics, however, boys are not allowed to play on girls [sic] teams in non-contact sports since boys historically have had ample opportunity for participation and currently have available to them sufficient avenues for interscholastic participation, and since to allow boys to play on girls [sic] teams in non-contact sports would displace girls from those teams and further limit their opportunities for participation in interscholastic athletics.

Contrary to the suggestion on page 4 of the Petition, the resolution of October 19, 1981, set out above did not modify the AIA's position concerning discrimination in athletics. The policy of the AIA since at least October 1975 has been to strive to provide equal overall athletic opportunities for male and female athletes, as that policy is described and regulated by Title IX of the Equal Education Amendments of 1972, 20 U.S.C. § 1687, et seq. (hereinafter "Title IX").

This desire to offer equal overall athletic opportunities, combined with ample evidence of historical discrimination against females in interscholastic athletics, led the members of the AIA to conclude that equal opportunities for female athletes in non-contact sports could best be obtained if certain sports were reserved for females.

2. On page 3 of their Petition, Petitioners note that there are no male interscholastic volleyball teams in Arizona. The AIA, however, does not prohibit the establishment of male interscholastic volleyball teams. As Paragraph 2 of the Resolution quoted above indicates, the member schools, not the AIA, determine which combination of sports programs best serve their students in light of budget considerations and student interest.

3. On page 6 of their Petition, Petitioners make the following allegation:

> It should be noted that there is nothing in the record to support the proposition that past discrimination against female interscholastic athletics has not been remedied or how denying males the opportunity to compete on some basis on a school's volleyball team will operate to deny females an opportunity to engage in interscholastic athletics.

The above allegation is untrue and is evidence of Petitioners' apparent desire to relitigate in this Court the factual findings made by the trial court, all of which are amply supported by the record. Numerous witnesses testified at the preliminary injunction that the effects of past discrimination against females in interscholastic athletics have not been eradicated. These witnesses also testified that allowing males to compete on female volleyball teams would limit female interscholastic athletic opportunities. Testimony to this effect is

also contained in stipulated facts[4] presented to the trial court. See Pet., Appendix D at 18-9 [First Set of Stipulated Facts - No.'s 37 and 38]; Appendix D at 7-9 [Second Set of Stipulated Facts, No.'s 15-7].

In addition to the testimony from witnesses concerning male participation on female volleyball teams, the AIA presented statistics and stipulated facts to demonstrate the historical inequality of opportunity in Arizona for female athletes. See, e.g., Pet., Appendix D at 5-6 [Supplemental Third Set of Stipulated Facts, No.'s 6-10]. For example, in the 1976-77 school year, there were 33,329 male participants in interscholastic sports in Arizona and 9,109 female participants. By the school year 1979-1980, these numbers had

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[4]The parties agreed that the District Court could render final judgment based on three sets of stipulated facts (see Pet., Appendix D), and the testimony and exhibits received at the preliminary injunction hearing.

increased to 40,240 male participants and 18,793 female participants. Thus the number of male participants increased by slightly more than 20% while female participants increased by slightly more than 100%. Despite the greater increased in female participation, however, there were still more than twice as many male as female participants.

Comparable statistics were offered in relation to fall sports, which for females includes volleyball. During the 1976-1977 school year, 3,616 females and 12,690 males participated in fall interscholastic sports in Arizona. In 1979-1980, 6,055 females and 14,991 males participated in fall sports. Female participation in fall interscholastic sports thus increased by approximatly 67% in this three-year period while male participation increased approximately 18%. Again, however, despite the greater increases in participation by female participants, there

were still more than twice as many males as females participating in fall sports. Thus, as Respondent Tony Komadina, Executive Director of the AIA, testified before the trial court, while the gap is narrowing, there are still substantial inequities to be corrected. See also Pet., Appendix D at 7-8 [Second Set of Stipulated Facts, No.'s 15-6].

Petitioners' suggestion throughout their Petition, (Pet. at 6,10,12), that there is no evidence of the effects of past discrimination is simply untrue. Their attempt to reargue the facts of this case before this Court in itself demonstrates that the Petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

In an attempt to convince this Court that important and special reasons are present which require review by writ of certiorari of the Ninth Circuit's decision, Petitioners allege that the Ninth Circuit's decision conflicts with decisions of this Court, and decisions of other federal and state courts. When these arguments are analyzed, however, it is apparent that there are no special or important, much less substantial, reasons indicating that review by this Court is either necessary or appropriate.

A. The Ninth Circuit's Decision Below is Not in Conflict with Prior Decisions of this Court.

Petitioners argue that the Ninth Circuit's opinion in this case is contrary to prior decisions of this Court. Pet. at 8-12. In so arguing, Petitioners cite and discuss numerous decisions of this Court. They fail,

however, to indicate precisely in what respect the Ninth Circuit's opinion conflicts with any decision of this Court. Even a cursory review reveals that no conflict exists.

Petitioners cite the recent case of Mississippi University for Women v. Hogan, 454 U.S. 962, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), for the proposition that a state enforced policy of sexual discrimination will be struck down when its supposed compensatory objective is without factual justification. Pet. at 8. The AIA's policy in this case, however, is amply supported by both facts and reason. The classification does not "reflect archaic and overbroad generalizations", Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), or "old notions" of differences between the sexes. Stanton v. Stanton, 421 U.S. 7, 14 (1975). Rather, the AIA's policy is substantially related to its compensatory

objective of promoting female interscholastic opportunities.

In Hogan, supra, this Court held that a state supported university's policy of excluding males from enrolling in professional nursing school violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. This Court recognized, however, that a gender-based classification favoring one sex could be justified if it intentionally and directly assisted members of the sex that are disproportionately burdened. 454 U.S. at _____, 102 S.Ct. at 3338, 73 L.Ed.2d at 1100. This Court cited Califano v. Webster, 430 U.S. 313 (1977), and Schlesinger v. Ballard, 419 U.S. 498 (1975), as examples of cases where otherwise discriminatory classifications were upheld on the basis that members of one sex suffered a disadvantage in relation to the classification. In Hogan,

supra, the State of Mississippi made no showing that women lacked opportunities to obtain training in the field of nursing, either presently or historically. Rather than compensate for discriminatory barriers, Mississippi University's policy of excluding males from nursing tended to perpetuate the stereotypical view of nursing as a female profession. 454 U.S. ____, 102 S.Ct. at 3339, 73 L.Ed.2d at 1101-2. In contrast, in the present action the stereotypical view and historical practice is that males rather than females participate in athletics. The AIA's policy assists in eliminating, rather than furthering, this improper stereotypical view. This Court's opinion in Mississippi University for Women v. Hogan, supra, supports in all respects the Ninth Circuit's decision in this action.

Petitioners also argue that "[t]he Ninth Circuit never addressed the proposition

established in Wengler v. Druggist Mutual Insurance Company, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980), that the group promulgating the gender-based discriminatory policy must prove the policy is substantially related to its compensatory objective." Pet. at 10-11. The Ninth Circuit, however, did not ignore this directive. The AIA clearly proved that its policy was and is substantially related to the objective of overcoming the continued effects of past discrimination against females in interscholastic athletics. Petitioners' recurrent suggestion that there simply is no factual evidence of the effects of past discrimination, Pet. at 6,10,12, is incorrect and evidences the futility of their argument.

B. The Ninth Circuit's Opinion is Not in Conflict With Decisions of Other Federal Courts or State Courts of Last Resort.

Petitioners argue at pages 13 through 19 of their Petition that the Ninth Circuit's

opinion is in conflict with decisions of other state and federal courts. The cases cited by Petitioners, however, do not reveal any conflict with the Ninth Circuit's decision in this case.

Petitioners discuss numerous cases which involved attempts by females to gain access to male athletic programs. Pet. at 14-6. For example, in Brendon v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973), the court allowed females to compete on male tennis, cross country, skiing and running teams in order to increase the athletic opportunities available to females. The District Court in Yellow Springs Board of Education v. Ohio School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978), rev'd on other grounds, 647 F.2d 651 (6th Cir. 1981), held that girls must be given the opportunity to compete with boys in interscholastic contact sports. In Hoover v. Meiklejohn, 430

F. Supp. 164 (D. Colo. 1977), the court permitted a girl to compete on the boys' high school soccer team.

Respondents have no quarrel with the above cases insofar as they guarantee a female athlete's right of access to the full range of public high school athletic programs, especially since females historically have suffered discrimination in athletic opportunities. It is incorrect, however, to suggest that these cases stand for the proposition that male students, while being provided ample overall athletic opportunities, may not be denied access to a particular female sport. Denying to males the opportunity to participate on female volleyball teams is permissible not only because of the historical inequities, but also because males possess different physical attributes than females. These objective physical differences provide males an

objective advantage in two of the six main skills in volleyball. See Pet., Appendix D, at 9 [Second Set of Stipulated Facts, No. 18]. As the court noted in Hoover v. Meiklejohn, supra:

> Given the lack of athletic opportunity for females in past years, the encouragement of female involvement in sports is a legitimate objective and separation of teams (by sex) may promote that purpose. [citations omitted] It may also justify the sanction of some sports only for females, of which volleyball may be an example. 430 F. Supp. at 170.

Courts have regularly rejected attempts by males to participate on female interscholastic teams. See, Forte v. Board of Education, 105 Misc. 2d 36, 431 N.Y. Supp. 2d 321 (1980) (resolution enacted by state public high school association prohibiting participation of male students on female interscholastic volleyball teams consistent with state law and regulations, and approved as permissible means of regressing the disparate

treatment female students have historically received in interscholastic athletics); Mularadelis v. Haldane Central School Board, 74 A.D.2d 248, 427 N.Y. Supp. 2d 458 (1980) (school board's decision denying to a male student the opportunity to play on the school all-female tennis team held not to violate Title IX, due process or equal protection).

Petrie v. Illinois High School Association, 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979), involved a situation which cannot be distinguished from the facts present in the instant case. The court in Petrie, supra, recognized that differences in physical stature and previous athletic opportunities were sufficient reasons to deny to males the opportunity to play on interscholastic female volleyball teams. The Petrie court's decision considered not only the equal protection clause of the United States Constitution, but the Illinois State Equal Rights Amendment,

which required a strict scrutiny analysis for sex-based classifications. The Petrie court found that the Illinois Athletic Association had a compelling state interest in developing female interscholastic athletics.

Petitioners rely heavily on the case of Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D. R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979). It should first be noted that the Gomes decision in the District Court was not based upon constitutional grounds. Rather, the court found that 45 C.F.R. § 86.41, adopted by the then Department of Health, Education and Welfare to implement Title IX, required a sport-by-sport analysis of whether members of one sex traditionally had been denied athletic opportunities. The case before this Court does not involve an interpretation of these regulations or Title IX. Nevertheless, Respondents submit that the court in Gomes was

incorrect in applying a test which would require equal opportunities in every sport rather than an examination of the overall athletic program. On appeal, the Department of Justice, representing the then Department of Health, Education and Welfare, submitted an amicus brief stating its position that the trial court incorrectly interpreted the regulations. See, Gomes v. Rhode Island Interscholastic League, 604 F.2d at 735, fn. 3. This issue was never addressed because the case was vacated as moot by the First Circuit Court of Appeals.

Petitioners' reliance on Attorney General v. Massachusetts Interscholastic Athletic Association, 393 N.E.2d 284 (1979), is also misplaced. In Massachusetts Interscholastic, supra, the court held that a rule of the Massachusetts Interscholastic Athletic Association that no boy could play on any girls' team violated the Massachusetts Equal

Rights Amendment, a Massachusetts statute prohibiting sex discrimination, and regulations promulgated pursuant to the statute. The statute and the Massachusetts Equal Rights Amendment, however, required a level of scrutiny greater than that required by the United States Constitution. The court made numerous references to this fact in rendering its decision. See, Massachusetts Interscholastic, 393 N.E.2d at 286 fn. 5, 289, and 291.

The Massachusetts Interscholastic case also involved an across-the-board prohibition against boys' participation on any girls' sport without an independent determination of the reasonableness of such a rule with respect to any particular sport. The court distinguished Petrie v. Illinois High School Association, supra, on this basis and wrote:

> That ruling [in Petrie] like Gomes, was confined to the particular situation; it was not concerned with the validity of a general ban. 393 N.E.2d at 290, fn. 25.

The court further stated:

> Classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo "archaic and overbroad generalizations." [Emphasis added] 393 N.E.2d at 293.

In the case presented to this Court, a clear factual showing was made with respect to skill differentials for hitting and blocking in volleyball based upon the objective physical differences between males and females. Pet., Appendix D at 9 [Second Set of Stipulated Facts, No. 18]. This showing simply was not made in the Massachusetts Interscholastic Association case.

As the above cases demonstrate, the Ninth Circuit's decision is in agreement, rather than in conflict, with the decisions of other courts that have considered the issue presented in this case. There is no need or reason for review by this Court.

C. The Federal Question Decided by the Ninth Circuit in this Case Does Not Present Important or Substantial Issues Which Merit Review by this Court.

Petitioners conclude their Petition by arguing that the questions presented in the Ninth Circuit's opinion are of sufficient importance to merit review by this Court. Such is clearly not the case. In making this argument, Petitioners suggest that this Court should address the question of "how long eligible males can be systematically excluded from a specific athletic program solely on the basis of their sex in order to remedy past discrimination against female athletes . . ." Pet. at 21. The question of when the effects of past discrimination against female athletes in Arizona will be eradicated, however, must be determined on a case-by-case basis after careful consideration of the relevant facts. This issue is not before the Court, and was not litigated before the trial court.

Petitioners' suggestion that the AIA rule has "no current functional use," Pet. at 21, is a misstatement of the evidence presented to the district court and to this Court, and is an attempt by Petitioners to find an issue, not actually present in the case, which might merit review.

CONCLUSION

Based on the above, Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's decision in this case.

RESPECTFULLY SUBMITTED this 9th day of June, 1983.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By John C. Richardson
John C. Richardson
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Respondents

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in the County of Pima, State of Arizona, in the offices of DeConcini McDonald Brammer Yetwin & Lacy, P.C., and am a member of the bar of this Court. My business address is 240 North Stone Avenue, Tucson, Arizona 85701. On June 9, 1983, I served the following:

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mail box at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Douglas H. Clark, Jr., Esq.
Jonathan Rothschild, Esq.
Mesch, Clark & Rothschild, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701
Attorneys for Petitioners

and by placing the original and forty copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mail box at Tucson, Arizona, addressed as follows, in accordance with Rule 28 of the Rules of the United States Supreme Court:

Alexander Stevas
Clerk of the United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Executed on June 9, 1983, at Tucson, Arizona. I certify under penalty of perjury that the foregoing is true and correct.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By John C. Richardson
John C. Richardson
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Respondents